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ORIGINAL

Nos. 85-5046, 85-5073 and 85-5134

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

TYRONE ADAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY ALONGI, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH MUSTACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment properly charged an offense under 21 U.S.C. 843(b).

2. Whether a defendant may be convicted for conspiracy to violate 18 U.S.C. 1962(c) without agreeing to commit personally at least two predicate offenses.

3. Whether a variance between the indictment and the facts adduced at trial prejudiced petitioner Mustacchio's defense.

4. Whether the district court erred in admitting the statements of a co-conspirator who was unavailable because he claimed his Fifth Amendment privilege.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A229-A247) 1/ is reported at 759 F.2d 1099.

1/ "Pet. App." refers to the Appendix to the Petition in No. 85-5046.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1985. Petitions for rehearing were denied on May 10, 1985, and May 31, 1985. The petitions for a writ of certiorari were filed on July 6, 1985 in No. 85-5046, on July 15, 1985 in No. 85-5073, and on July 27, 1985 in No. 85-5134. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the District of New Jersey, petitioner Adams was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activities (RICO), in violation of 18 U.S.C. 1962(d) (Count 1); committing a substantive RICO violation, in violation of 18 U.S.C. 1962(c) (Count 2); conspiring to distribute and to possess with intent to distribute quantities of controlled substances, in violation of 21 U.S.C. 846 (Count 4); and using a telephone to facilitate a narcotics conspiracy, in violation of 21 U.S.C. 843(b) (Counts 25 and 56). Petitioners Alongi and Mustacchio were also convicted on Count 4. In addition, Alongi was convicted on one count of using a telephone to facilitate a drug conspiracy (Count 31). Petitioner Adams was sentenced to concurrent two-year terms of imprisonment on each of Counts 1, 2, and 4 and a suspended sentence on Counts 25 and 56, to be followed by four years' probation. Petitioner Alongi was sentenced to three years' imprisonment on Count 4 to be followed by five years' probation on Count 31. Petitioner Mustacchio received a 14-year term of imprisonment on Count 4. 2/

2/ Five co-defendants, Thomas DiDonato, John Hairston, Michael Viscito, Clifton Brooks and Nicholas Gallicchio were also charged with RICO conspiracy, conspiring to distribute controlled substances, and using a telephone to facilitate a narcotics conspiracy. All of the co-defendants except Michael Viscito were convicted on every charge. Viscito was acquitted on the substantive RICO charge.

The evidence at trial showed that Nicholas Valvano and his friend Stanley Buglione operated a purportedly charitable organization called Concern for the Handicapped. In reality, the main purpose of the organization was the distribution of narcotics. The conspiracy rented a social club, which in time became the clearinghouse for its operations. Petitioners Adams and Alongi participated in the conspiracy by buying and selling "speed" for the organization. Petitioner Mustacchio participated in the conspiracy's marijuana importation scheme (Pet. App. A235, A244).

2. On appeal, petitioner Adams argued, inter alia, that the trial court should have instructed the jury that in order to convict him of RICO conspiracy, the jury had to find that he agreed to commit personally two or more predicate acts of racketeering. Both petitioners Adams and Alongi argued that the telephone facilitation count was insufficient because it failed to name a particular controlled substance. Petitioner Mustacchio argued, inter alia, that there was a prejudicial variance between the indictment and the proof at trial and that the district court improperly admitted co-conspirator hearsay statements.

The court of appeals first observed that the circuits have differed in their analyses of the question of a defendant's personal participation in a RICO conspiracy. It concluded, however, that, in its view, in order to be convicted of RICO conspiracy, a defendant need only agree to the commission of the predicate acts and need not agree to commit the acts himself (Pet. App. A246). It further concluded that the indictment sufficiently advised petitioners of the charges against them (Pet. App. A247).

The court of appeals noted that the indictment charged a conspiracy to distribute certain specified narcotics but did not list marijuana, even though the evidence at trial showed that petitioner Mustacchio participated in marijuana transactions.

However, in the court's view, this variance did not warrant a reversal. Mustaccnio learned before trial that marijuana evidence would be introduced, and therefore his defense was not prejudiced (Pet. App. A240). The court further found that the district court had properly concluded that co-conspirator Nicholas Valvano was unavailable as a witness before admitting his co-conspirator hearsay statements. Valvano appeared before the district court and asserted his Fifth Amendment privilege at a hearing on the admissibility of the statements (Pet. App. A235-A237).

ARGUMENT

1. Petitioners Adams and Alongi first argue (No. 85-5046 Pet. 6-9; No. 85-5073 Pet. 3-7) that the telephone facilitation counts did not adequately apprise them of the charges against them because the counts did not state which particular controlled substances were to be distributed. The court below properly rejected petitioners' arguments.

Counts 25, 31, and 56 specified the exact time and the particular date of the telephone communication and specified the

particular persons that were involved in the conversations. 3/ Hence, the indictment clearly meets the test set forth by this Court in Hamling v. United States, 418 U.S. 87, 117 (1984), that an indictment is sufficient where it "contains the elements of

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3/ Count 25 charged:

> That at approximately 6:21 p.m. on August 30, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> TYRONE ADAMS
>
> knowingly and intentionally did use and cause to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

Count 56 charged:

> That at approximately 9:23 a.m. on October 24, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> TYRONE ADAMS
>
> knowingly and intentionally did use and caused to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

Count 31 charged:

> That at approximately 4:46 p.m. on September 17, 1983, at Newark, in the District of New Jersey, the defendants
>
> NICHOLAS VALVANO
> a/k/a "Nicky Boy," and
> ANTHONY ALONGI
>
> knowingly and intentionally did use and cause to be used a communication facility, that is, a telephone, in facilitating a knowing and wilful conspiracy to distribute and possess with intent to distribute controlled substances, a felony under Title 21, United States Code, Section 846.

the offense charged and fairly informs a defendant of the charge against which he must defend and * * * enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." See also United States v. Miller, No. 83-1750 (Apr. 1, 1985), slip op. 4-5.

Moreover, petitioner's claims are especially meritless in light of the government's submission of a bill of particulars that identified the controlled substances alleged to have been distributed by the co-conspirators (see Pet. App. A224-A226).

United States v. Hinkle, 637 F.2d 1154 (7th Cir. 1981), upon which petitioners rely, is inapposite. As the court of appeals observed (Pet. App. A247), in Hinkle the indictment failed to specify the other party to the conversation, the time when it took place, or which of the six types of acts prohibited by 18 U.S.C. 841(a)(1) were involved. Here, as we have noted, the indictment fairly informed petitioners that particular telephone calls facilitated a conspiracy to distribute a controlled substance.

2. In order to convict a defendant of violating 18 U.S.C. 1962(c), the government must prove that he conducted or participated in the affairs of an enterprise through a "pattern of racketeering activity." A "pattern of racketeering activity" is defined by 18 U.S.C. 1961(5) as two or more acts of racketeering activity. Petitioner Adams, who was convicted of conspiring to violate 18 U.S.C. 1962(c), contends (No. 85-5046 Pet. 9-12) that the trial court erred when it declined to instruct the jury that conviction for that offense requires proof that each conspirator agreed, not only to join the conspiracy, but also to commit two or more predicate offenses personally. Adams claims that the judge should not have limited his

instructions to a description of the elements of 18 U.S.C. 1962(c) and the traditional elements of the crime of conspiracy. The court of appeals disagreed with petitioner and held (Pet. App. A246):

> We now decide that to be convicted of a RICO conspiracy, a defendant must agree only to the commission of the predicate acts, and need not agree to commit personally those acts.

The court of appeals' decision is correct and does not warrant further review. Initially, we note that in Adams' case, where the jury found that he had actually committed two predicate acts, "the inference of an agreement to do so is unmistakable." United States v. Carter, 721 F.2d 1514, 1530 (11th Cir.), cert. denied, No. 83-1743 (Oct. 1, 1984), quoting United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978). Hence, even if the court had incorrectly charged the jury, Adams' convictions on the two predicate acts would have rendered the error harmless. Thus, this case is not an appropriate vehicle for review.

In any event, this Court has recently denied certiorari on this same issue and no different result is warranted here. See United States v. Carter, supra. As we argued in our Brief in Opposition in that case, 4/ it is well established that the crime of conspiracy generally has two elements: (1) an agreement the objective of which is the commission of one or more unlawful acts and (2) the performance by a conspirator of at least one overt act in furtherance of the conspiracy. Braverman v. United States, 317 U.S. 49, 53 (1942). There is no requirement that each conspirator must agree to personally perform the illegal act or acts that constitute the conspiracy's object. On the contrary, a conspirator may be convicted "upon showing sufficiently the essential nature of the plan and [his]

4/ We have furnished petitioner Adams with a copy of that Brief In Opposition.

connections with it." Blumenthal v. United States, 332 U.S. 539, 557 (1947).

In enacting the conspiracy provision of the RICO statute, Congress manifested no intent to alter this established principle. Far from imposing such an additional restriction on the prosecution, Congress mandated that the RICO statute be liberally construed to achieve its objective of combatting organized crime. Russello v. United States, 464 U.S. 16 (1983); United States v. Turkette, 452 U.S. 576, 588-589 (1981).

In arguing that RICO conspiracy does contain this additional element, Adams relies on First, Second, and Fifth Circuit cases. However, none of those cases reversed a defendant's conviction on the ground that, even though he had agreed to participate in the affairs of an enterprise that contemplated the commission of two or more acts of racketeering, he had not personally agreed to commit two predicate acts himself. Thus, the somewhat imprecise language in those opinions on which Adams relies carries little weight.

In United States v. Elliott, 571 F.2d 880, 900-905 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978) (see Pet. 11), the court held merely that the indictment charged a single conspiracy to violate 18 U.S.C. 1962(c) and not multiple conspiracies, as the defendants claimed. The court stated (571 F.2d at 902 (emphasis added)) that "[t]he gravamen of the conspiracy charge in this case * * * is that each [conspirator] agreed to participate * * * in the affairs of the enterprise by committing two or more predicate crimes." In making this statement, the court was describing the facts alleged in that case, not the requirements of RICO conspiracy. The court added (id. at 903 (emphasis in original)) that a conspiracy to violate Section 1962(c) requires proof of "an agreement to participate * * * in the affairs of an enterprise through the commission of two or more predicate crimes." This statement is ambiguous. In our view, it may and

should be read to mean only that a conspirator must agree to the commission of two or more predicate crimes, not that he will personally commit them.

In United States v. Martino, 648 F.2d 367, 394 (5th Cir. 1981) 5/ (see Pet. 11), the court stated that conviction for conspiracy to violate 18 U.S.C. 1962(c) requires proof that the defendant agreed "to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." The court then reversed a conviction for conspiracy to violate Section 1962(c) where the evidence did not show that the defendant had agreed to the commission of more than one predicate crime (648 F.2d at 396). The court did not hold that the government was required to prove that the defendant agreed to personally commit two or more predicate crimes.

Similarly, in United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, No. 83-2036 (Oct. 1, 1984) (see Pet. 11), the jury was instructed that it must find, to convict on a RICO conspiracy, that the defendant himself agreed to commit two or more predicate acts. After the Second Circuit concluded that one of the predicate acts--a gambling conspiracy--was legally insufficient, it dismissed the RICO conspiracy count because the jury had only found that he had agreed to commit one predicate act. In other words, the jury did not find that the defendant had agreed to the commission of more than one predicate crime. Finally, in United States v. Winter, 663 F.2d 1120, 1135-1138 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983) (see Pet. 11), the First Circuit relied on dicta in Elliott for the proposition that a RICO conspiracy count must charge that each

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5/ This Court denied the petitions for certiorari challenging the criminal convictions in that case (456 U.S. 943 (1982)). The Court affirmed the judgment of forfeiture. Russello v. United States, supra.

defendant agreed to personally commit two or more predicate crimes. But, as we have argued, Elliott should be read to mean only that a conspirator must agree to the commission of two or more predicate crimes, not that he will personally commit them.

In sum, in none of the cases cited by Adams reversed a conviction on the ground that even though the defendant agreed to participate in the affairs of an enterprise that he knew would commit two or more racketeering acts, he did not agree to personally commit the acts. Since Adams' argument is plainly inconsistent with fundamental principles of conspiracy law, there is no need to review the correct result reached here by the lower courts.

3. Petitioner Mustacchio further argues (No. 85-5134 Pet. 6-11) that because his efforts to import marijuana were not expressly alleged in the indictment, his Fifth Amendment right not to be tried for a felony except upon indictment by a grand jury was violated. 6/ Relying on Stirone v. United States, 361 U.S. 212 (1960), petitioner argues that the facts presented at trial were "broader" than the facts presented to the grand jury. The court below properly rejected petitioner's claim.

As this Court most recently set forth in United States v. Miller, No. 83-1750 (Apr. 1, 1985) at slip op. 6, "an indictment may charge * * * the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set forth in the indictment, the right to a grand jury is not normally violated by

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6/ Count 4 charged that from May 1983 until November 22, 1983 petitioner and 45 other co-defendants conspired to distribute and to possess with intent to distribute quantities of controlled substances, in violation of 21 U.S.C. 841(a)(1). It further alleged that as part of the conspiracy, the defendants would distribute cocaine, dilaudid, methamphetamine and diasepem (Pet. A17). After co-defendants Suppa and Beglione pleaded guilty and agreed to testify for the government, the government informed petitioner during the course of pretrial motions that the two co-defendants would testify concerning marijuana importation that occurred during the charged conspiracy.

the fact that the indictment alleges * * * other means of committing the same crime." Only when the charges in an indictment are broadened significantly by proof at trial which alters the essential elements of the crime does a variation between pleading and proof destroy the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Id. at slip op. 9-10.

In the instant case, the court below properly determined that the government's proof at trial did not alter the essential elements of the offense but rather only varied from the indictment in the sense that it involved a controlled substance--marijuana--that was not described in the indictment as a drug the conspirators planned to distribute. See United States v. Ramos, 666 F.2d 469, 476-478 (11th Cir. 1982); United States v. McCrary, 669 F.2d 1308, 1310-1311 (11th Cir. 1983). As the court below noted, Mustacchio did not "raise[ ] a substantial argument that a double jeopardy problem exist[ed]." (Pet. App. A240). Nor did Mustacchio "allege that his defense was prejudiced" since "[k]nowledge that the marijuana evidence would be introduced at trial was available to [Mustacchio] during the pretrial stage" (ibid.). Accordingly, his claim lacks merit.

4. Petitioner Mustacchio finally claims (No. 85-5134 Pet. 11-17) that the district court improperly admitted under the co-conspirator rule (Fed. R. Evid. 801(d)(2)(E)) hearsay statements made by Nicholas Valvano without first correctly determining that they passed muster under the Confrontation Clause. Petitioner argues that the court below improperly relied on Valvano's statement that, if called, he would assert his Fifth Amendment privilege, in finding that Valvano was unavailable as is required by United States v. Inadi, 748 F.2d 812 (3d Cir. 1984), petition for cert. granted, No. 84-1580 (May 28, 1985). According to petitioner, the district court expressly indicated that it would not find Valvano unavailable based upon assertion of his Fifth

Amendment privilege, because, in the district court's view, Valvano could not claim the privilege after sentencing. And, although Valvano had not been sentenced prior to the court's ruling on the confrontation question, the district court offered to sentence him forthwith, in order that the perceived barrier to availability would be removed. Petitioner's argument is unsound.

As is evident from our brief in Inadi, we disagree with the proposition that co-conspirator statements may not be admitted unless the declarant is produced or shown to be unavailable. 7/ But there is no reason to hold the instant case pending disposition of Inadi since the court of appeals here reached a result that was entirely consistent with its prior decision in Inadi. Thus, even assuming that unavailability is required, the court of appeals found that such a showing was made here (Pet. App. A236-A237). Through his attorney, Valvano expressly invoked his Fifth Amendment privilege. Because of this, as the court of appeals found, he was clearly unavailable as a witness.

As Mustacchio notes (No. 85-5134 Pet. 12), the district court stated in passing that Valvano could not invoke his privilege after sentencing. In fact, however, Valvano was not sentenced until after the trial, and in any event, it seems clear that Valvano would have been entitled to invoke his privilege after sentencing in the circumstances of this case. Since Valvano was under suspicion for many other related offenses, chargeable under federal or state law, he could have properly invoked his privilege despite the imposition of sentence.

7/ We have furnished petitioner Mustacchio with a copy of our brief in Inadi.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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